IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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D.B. INCOME TAX APPEAL NO.78/2005

Commissioner of Income Tax

Versus

S.C. Sethi

Date of Order : 10.3.2006

PRESENT

HON'BLE MR.RAJESH BALIA, J.
HON'BLE MR. JUSTICE R.P. VYAS

Mr.K.K. Bissa, for the appellant.
Mr.Rajendra Mehta, for the respondents.

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Heard the learned counsel for the parties.

This appeal is directed against the order of Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur dated 20.2.2004.

The substantial question of law, which according to the appellant arises in this appeal has been stated as under:

"Whether on the facts and in the circumstances of the case and in law, the learned Tribunal was

justified in upholding deletion of Rs.4,67,200/- following its earlier order for A.Y. 1994-95 holding that no addition can be made on the basis of uncorroborated piece of evidence/ document found in the course of search in third party, ignoring the fact that the records pertaining to the assessee were being kept by the person where the search was conducted and the loose papers found during the course of search clearly indicate that not only the assessee was getting additional quarterly payments and perks over and above his salary, but the assessee was also himself dealing with those payments and perks on behalf of the employer company?

The factual matrix of the case is that according to the case of the Revenue, a survey was conducted in pursuance of search warrant issued against the premises of J.K. Industries/J.K. Tyre Ltd. In the course of search, certain documents were seized from the residence of one of the Sr. Manager (Accounts) Sh. A.K. Chhajer. It is on the basis of some entry in loose papers seized from Sh. Chhajer, additions were made in the income of the respondent – assessee to the tune of Rs.4,67,200/- as income from

undisclosed source by referring it to the emoluments received from the employer over and above the one which were admitted to have been received by him. The first assessment in the case of assesee was finalized assessing the return filed on 29.6.1993. The original assessment was completed on 28.3.1996. The notice issued to Sh. A.K. Chhajer was not served on him and, therefore, he had not appeared before the Income Tax Officer so as to be available for cross-examination by the assessee.

The assessment order dtd.28.3.1996 was subjected to appeal by respondent – assessee Sh. Swaroop Chand Sethi which was allowed by the Commissioner of Income Tax (Appeals) vide his order dtd.12.9.1996. Apart from the aforesaid loose papers seized from Sh. A.K. Chhajer, no other incriminating material was before he Assessing Officer. An affidavit was filed by Corporate Vice President clearly stating that the Company had paid to Sh. S.C. Sethi a sum of Rs.1,80,000/- on account of salary and Rs.56,836/- on account of perquisite and duly deducted tax at source amounting to Rs.64,213/-. Full particulars of such payments of salary and perquisite would appear from the salary certificate issued to Sh. S.C. Sethi. The said certificate truly and correctly records all payments of salary

and perquisites made available to the assessee by the company. Save and except the amounts mentioned in the annexed certificate, no other sum of any nature whatsoever was made by the company to Sh. S.C. Sethi from any source whatsoever for his employment.

The Corporate Vice President was not further examined by the Assessing Officer.

The Commissioner of Income Tax (Appeals) held that none of the entries in the seized documents, relied on by the Assessing Officer indicates that the amount was received by the assessee and the observation of Assessing Officer that page No.67 and 71 indicates the receipt by the assessee is factually incorrect. Further it was noticed by the learned CIT (A) that since the assessee has demanded cross-examination of Sh. A.K. Chhajer before loose papers seized from his residence could be used against the assessee, but such opportunity was not offered to the assessee, therefore, the assessment suffers from procedural errors. With these findings, the assessment order was set aside and the the assessing officer was directed to complete the assessment denovo.

This order of CIT (A) was not challenged by the Revenue.

The assessing officer in pursuance of aforesaid directions again issued notices at the same address where from the notices earlier addressed to Sh. A.K. Chhajed were returned unserved and without seeking presence of Sh. A.K. Chhajed, has fallen back on his earlier assessment reiterating the addition of Rs.4,67,200/- in the returned income of the assessee for the same reason as prevailed with the assessing officer in the earlier assessment order.

This order of assessment dtd. nil was subjected to appeal. The Commissioner of Income Tax (Appeals) referred to his earlier finding that none of the page No.67, 71 and 80 indicate that the amount was paid by the company or received by the appellant and, therefore, the observation of the Assessing Officer that page No.67 and 71 indicate the receipts is factually incorrect. The learned CIT (A) also relied on the fact that the assessing officer has not still obtained attendance of said Sh. A.K. Chhajer for being cross-examined by the assessee, therefore, the assessing officer could not have reinstated his earlier assessment order on very same material by ignoring the

finding earlier recorded by the CIT(A). This order of CIT (A) was affirmed in appeal by the Income Tax Appellate Tribunal which is subject matter of this appeal.

The facts stated above clearly indicate that no question of law arises in this appeal. The finding recorded by the Tribunal are findings of fact affirming the earlier finding of fact recorded by the Commissioner of Income Tax (Appeals). Apparently when the loose papers by itself did not indicate receipt of alleged undisclosed income by the assessee and peripheral reliance on the document was not earlier countenanced in absence of opportunity of cross-examination of the persons from whose possession the loose papers were recovered. The fact that the assessing officer has not made any efforts to serve said Sh. A.K. Chhajer and secure his presence by invoking powers under the Income Tax Act for securing presence of any witness also goes to show that the assessing officer has not really made efforts to give effect to the directions of Commissioner of Income Tax (Appeals) for making available opportunity of cross-examining Sh. A.K. Chhajer to the assessee.

It is also to be noticed that affidavit of corporate Vice

President about total emoluments flowing from the employer to assessee remains uncontroverted and could not have been ignored.

In that view of the matter, the findings recorded by the Tribunal being findings of fact do not give rise to the question of law.

Moreover another fact which is also not in dispute that for subsequent year 1994-95 on the very same facts, the assessment order had been set aside by the Commissioner of Income Tax (Appeals) and affirmed by the Tribunal and such deletion of the very same income has not been subjected to appeal and has been accepted by the department.

Accordingly, the present appeal fails and is hereby dismissed.

No order as to costs.

(R.P.VYAS),J. **(RAJESH BALIA)J.**

SS/-